

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
REPLY BRIEF**

ORIGINAL
WITH PROOF
OF SERVICE

77-1279

UNITED STATES COURT OF APPEALS

for the

SECOND CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

-against-

ROBERT A. GUBELMAN, SR.,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF THE
UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

REPLY BRIEF OF DEFENDANT-APPELLANT

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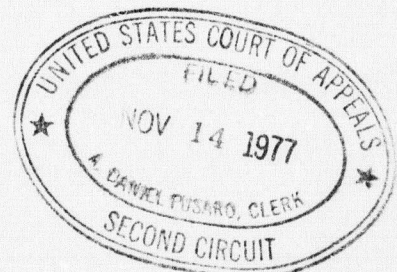


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UNITED STATES COURT OF APPEALS
for the
SECOND CIRCUIT

DOCKET NO. 77-1279

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
- against -
ROBERT A. GUBELMAN, SR.,
Defendant-Appellant.

REPLY BRIEF OF DEFENDANT-APPELLANT ROBERT A. GUBELMAN, SR.
(who will be referred to herein as "Defendant")

ARGUMENT

In this appeal from a judgement of criminal conviction, Defendant has raised issue as to the introduction, in the course of his trial, of evidence of so-called "similar" criminal acts; which evidence, in fact, constituted the bulk of the Government's case. In its answering brief the Government makes four points: that Defendant did not make proper objection during the trial; that the similar acts were part of a "common scheme or plan;" that the similar acts were necessary for the purpose of identifying Defendant; and that the similar acts were necessary in order to show knowledge or intent. The Government treats these four matters as one general point relating to the discretion of the Trial Court, but

we feel that for proper analysis they should be considered separately, and we will add a final point that, whatever the technical basis of admissibility, the prejudicial impact of this evidence far outweighed its probative value.

POINT I

THERE WAS SUFFICIENT OBJECTION DURING
THE TRIAL TO THE INTRODUCTION OF
EVIDENCE RELATING TO "SIMILAR ACTS".

The threshold issue raised by the Government in its answering brief is whether or not this Court need consider Defendant's appeal for the reason that there was not sufficient objection by his counsel in the course of the trial. In reply, we think it sufficient to bring to the Court's attention the extracts from the transcript which follow.

At the start of the trial, the Court indicated that there would be evidence of "similar acts."

"MR. PRINCE: Your Honor, may I just have the record show that I would respectfully object on the similar acts being introduced at any time during the trial.

JUDGE COOPER: Exactly. You don't have to object in the federal practice. Your objection is automatic." (Tr. 4-5)

Notwithstanding the Court's advice that objection was not necessary, at the time of the actual introduction of such evidence, the record reflects the following colloquy:

"MR. PRINCE: My answer is, your Honor, that they are not similar acts at all.

THE COURT: How do you figure?

MR. PRINCE: I say similar acts call for a particular time and place which are correlated one to the other. I certainly say anything that would have to do in 1974 or '75 is strictly off limits. It is not even mentioned in the indictment or any charge.

Regarding Schaffer, we have isolated dates with no corroboration of any kind or substance and I really think that at this moment all it is is inflammatory and it does not do anything except to prejudice the defendant's right to a fair trial." (Tr. 238).*

The Government asserts that in the give-and-take of a trial, it is incumbent upon defense counsel to make more precise objection in respect of matters, such as this, clearly going to the basic fairness of the trial. We disagree.

* The first paragraph of trial counsel's objection, just quoted, referred to proposed testimony that "would have to do in 1974 or '75" (Tr. 238). That was Mr. Rosenman's testimony about Consolidated Beef. The second paragraph of the objection, "regarding Schaffer," concerned the proposed similar acts testimony of Mr. Lustgarten.

POINT II

THE "SIMILAR ACTS" WERE NOT PART OF A COMMON SCHEME OR PLAN.

The "similar acts" asserted against Defendant were bribes at significantly different times (in one instance as much as eighteen months from the most proximate charged offense) and at different locations, involving different companies conducting different businesses; and the bribes themselves were substantially different in nature.* The Government takes the position that since all the asserted bribes arose out of his position as a meat inspector and were made by companies subject to his inspection, they were sufficiently "similar" and, being of such similarity, that they were ipso facto part of a "common scheme or plan." The Government then cites three criminal cases involving securities fraud: United States v. Birrell, 447 F.2d 1168 (2d Cir. 1971), cert. denied, 404 U.S. 1025 (1972); United States v. Light, 394 F.2d 908 (2d Cir. 1968); United States v. Bilotti, 380 F.2d 649 (2d Cir.), cert. denied, 389 U.S. 944 (1967).

But, these cases are readily distinguishable. To begin with, in all of them the indictments specifically charged a "scheme to defraud" and, in some instances, a conspiracy to defraud. There is no doubt that, if a scheme or a conspiracy is charged in an indictment, evidence of acts pursuant to such scheme or conspiracy is admissible, although the acts were not

* Money, cigars, and two packages.

specifically charged. However, that is not the situation at hand. The Defendant was charged with no scheme, no conspiracy. He was indicted for three substantive, independent offenses and tried for two of them.

Then too, in these cases cited by the Government there were common instrumentalities by means of which the schemes charged were effectuated: certain issuers of securities, certain brokerage firms and, indeed, certain brokerage accounts. Here, there were no such common threads running through the offenses set forth in the indictment and the "similar acts" presented during the trial below.

United States v. Johnson, 382 F.2d 280 (2d Cir. 1967), also cited by the Government, does not appear to involve an indictment charging a scheme. In this case Johnson was accused of hijacking two hand trucks belonging to a certain transporter of dresses which had previously employed him. The "similar act" was a second attempt at a hijacking of a hand truck of the same company, in the same vicinity, and during the same morning as one of the hijackings charged. So, there are two important bases of interrelation between the charges in the indictment and the similar act. One is that the hijackings charged and the attempt, not charged but treated as a "similar act," all related to the same company which had previously employed Johnson, and the second is that the attempt ("similar act") took place at the same location and literally within hours of one of the two charged hijackings. In this essential

respect of interrelation the case is completely different from that at hand.

The Government also cites United States v. Laurelli, 293 F.2d 830 (3d Cir. 1961), cert. denied, 368 U.S. 961 (1962). This case involved payoffs of a Government inspector at a certain construction site. In addition to the offenses charged, "similar act" testimony was admitted as to two additional attempted payoffs to another inspector at the same construction site. The majority opinion relied on the fact that "the project was the same." In other words, a payoff of one inspector at a certain construction site is necessarily related to the payoff of another inspector at the same construction site, therefore it is certainly reasonable to conclude that the payoffs were indeed part of a common scheme or plan. And, it should be noted that, notwithstanding this distinguishing aspect, there was a strong dissent.

Finally, the Government cites United States v. Brehm, 196 F.2d 769 (D.C. Cir.), cert. denied, 344 U.S. 838 (1952), on the matter of common scheme or plan. In Brehm, a United States Representative had been charged with receiving contributions from two clerks in his office on various dates for use in campaign financing. The Government had introduced in evidence testimony that monthly contributions had been made for three years by one of these clerks in addition the contribution which was charged in the indictment. After trial, Brehm was found "not guilty" of the charge relating to this clerk but "guilty" of the other. Payments on a regular monthly basis from a staff

member are obviously pursuant to a "common scheme" embracing the one payment which was charged in the indictment. The fact that there was an acquittal on that count cannot vitiate the conviction on the other.

The case at hand is thus basically different from Laurelli and Brehm. If the "similar acts" below were merely continuing bribes beyond those charged by the same persons or company (Brehm) or if one bribe related to the same project and apparently was necessary to effectuate the bribe charged (Laurelli), an overall plan or scheme would appear. But that simply is not the case at hand. The alleged bribes were completely unrelated.

POINT III.

THERE WAS NO ISSUE OF IDENTIFICATION.

There was never any issue at the trial below of the actual identification of Defendant. His presence at the particular plants and his responsibilities were a matter of official record. The questioning of witnesses as to the appearance of Defendant at various times (it seems that he sometimes wore beards and mustaches in various styles) were for the sole purpose of testing the credibility of the witnesses and in particular the sharpness of their recollections; and any reading of the transcripts, we submit, makes that clear. Defendant in his own testimony never denied that he was present as a meat inspector at the various plants, and he recognized and identified the officials of the various companies. The only issue raised

was whether or not they had in fact made the particular payments to him.

POINT IV.

THERE WAS NO ISSUE OF INTENT AND KNOWLEDGE.

The government in its answering brief finally asserts that the "similar act" evidence was necessary in order to establish the intent and knowledge of the Defendant.* In reply we point out that the Government at the start of its brief makes it clear that intent and knowledge were not issues at the trial:

"Gubelman simply denied taking the bribes, claiming that all four government witnesses who testified that they gave money to him were lying." (Government Brief, p. 3.)

How could there be any other defense? Could Defendant possibly have accepted money believing it was proper? Could he possibly have accepted money without knowing he was accepting money? Then too, as we have already pointed out, the Trial Court charged the jury:

"The purpose or intent with which the money was given and with which it was accepted is not relevant to a finding of guilt."
(A-30; Tr. 523).

The Government answers that thereafter the Court charged as to the allegations of "knowingly and willfully" in the indictment and in so doing reintroduced an issue of intent.

* Unlike United States v. Gardin, 382 F.2d 601 (2d Cir. 1967) and United States v. Johnson, 382 F.2d 280 (2d Cir. 1967), the Government here had no burden of proving intent. In Gardin and Johnson the defendants had been charged under statutes which specified "intent to defraud" and "intent to convert" respectively.

We say on the contrary that that portion of the Court's charge was merely for the purpose of keeping the jury from becoming confused by this language. Had there been any possible basis of factual issue, certainly the Court would have pointed it out. The Court went on to make it clear that the only real issue was the credibility of Defendant as a witness, who in turn had raised no issue except whether he had in fact received the bribes.

These four points by the Government commingled under the general heading of the discretion of the Court, when separately examined, are shown to lack substance. There are real criteria as to the admissibility of similar act evidence as this Court held in United States v. DeCicco, 435 F.2d 478 (2d Cir. 1970), and, if the similar acts do not meet those criteria, then the introduction of evidence as to them is reversible error.

POINT V.

THE PREJUDICIAL EFFECT OF THE SIMILAR
ACT TESTIMONY OUTWEIGHED ANY PROBATIVE
VALUE WHICH IT MAY HAVE HAD.

Finally, we point out again that even should the evidence of "similar acts" fall within the qualitative strictures of Rule 404(b), it should nevertheless have been excluded under Rule 403 because "its probative value is substantially outweighed by the danger of unfair prejudice."

In the course of the trial, the Government presented six witnesses who testified that the defendant took bribes in

violation of 21 U.S.C. § 622. And yet, only two of the witnesses testified as to bribes which were charged in the indictment. The other four asserted bribes which were not charged in the indictment. So the Government, had it presented evidence solely in respect of the offenses charged, would have had two witnesses with a certain impact. Witnesses, of course, are not fungible. However, there is nothing in the record to show that any one of these witnesses had any different impact on the jury than any other witness. The apparent effect of the "similar act" testimony is that the Government literally trebled its prosecutorial punch.

In this respect alone, consider the cases upon which the Government primarily relies:* In United States v. Murphy, 480 F.2d 256 (1st Cir.), cert. denied, 414 U.S. 912 (1973), there seem to have been ten transactions representing charged offenses as opposed to two in respect of similar offenses; in United States v. Laurelli, 293 F.2d 830 (3d Cir. 1961), cert. denied, 368 U.S. 961 (1962), it was one and one; in United States v. Brehm, 196 F.2d 769 (D.C. Cir.), cert. denied, 344

* The Government states in its brief that although there are no reported decisions of the Second Circuit relating to "similar act" evidence under 21 U.S.C. § 622 Judge Weinstein admitted similar act proof in two cases arising from the same investigation. The Government states that issue was raised in United States v. Maddalena, 76 Cr. 698 (E.D.N.Y.), aff'd. without opinion, 556 F.2d 562 (2d Cir. 1977). However, Local Rule § 0.23 of this Circuit "Dispositions in Open Court or by Summary Order," clearly provides that "since these statements [oral decisions] do not constitute formal opinions of the court and are unreported and not uniformly available to all parties, they shall not be cited or otherwise used in unrelated cases before this or any other court."

U.S. 838 (1952), it was two witnesses as to acts charged and one of them also testified as to the similar acts. In United States v. Johnson, 382 F.2d 280 (2d Cir. 1967), there were two witnesses as to acts charged, and one as to similar acts. If the Court sustains the ratio in the case at hand of two witnesses as to charged offenses to four different witnesses as to similar acts, then what is to keep an indictment from being a mere nominal recitation of a sample instance, thus leaving the defendant to be put on notice for the first time at the trial of the Government's real case against him?

The impact of the prejudice can be seen in the Government's brief (p.2), in which "The Statement of Facts" starts as follows: "Robert Gubelman was a corrupt federal meat inspector . . ." In other words, the initial and basic fact asserted by the Government itself does not relate to a finding by the jury respecting the charges in the indictment, but rather to the character of defendant as evidenced by the preponderant "similar act" testimony. And, right off the bat, this message of bad character is the message which the Government conveys to this Court.*

The Government asserts that this is a matter properly within the discretion of the Trial Court. It strikes us that the point has been reached at which this Court should assert an appropriate guideline.

* The assertion on page 2 of the Government's Brief that "on one occasion Gubelman forced a company to close until the owner capitulated to Gubelman's demands for money" is not confirmed by the testimony of any of the Government's trial witnesses.

CONCLUSION

The "similar act" testimony in this case did not relate to intent, identity, or a common scheme and was therefore not within Rule 404(b), unless the criteria in these respects is reduced to a mere nominality. And, in addition, a quantitative impression of the impact of the "similar act" evidence here indicates that rather than supplementing the Government's case it was the Government's case and therefore the prejudicial effect far outweighed any probative value.

Accordingly, the conviction below should be reversed.

Respectfully submitted,

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STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.

RICHARD WITHERS, being duly sworn,
deposes and says that deponent is not a party to the action,
is over 18 years of age and resides at 1526 Webster Ave. Apt. B-3
Bronx, NY 10457.

That on the 14 day of NOVEMBER, 1977,
deponent personally served the within REPLY BRIEF OF
DEFENDANT-APPELLANT
upon the attorneys designated below who represent the
indicated parties in this action and at the addresses below
stated which are those that have been designated by said
attorneys for that purpose.

By leaving 2 true copies of same with a duly
authorized person at their designated office.

~~By depositing _____ true copies of same enclosed
in a postpaid properly addressed wrapper, in the post office
or official depository under the exclusive care and custody
of the United States post office department within the State
of New York.~~

Names of attorneys served, together with the names
of the clients represented and the attorneys' designated
addresses.

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Richard Withers

Sworn to before me this

14 day of November, 1977

Michael DeSantis
MICHAEL DeSANTIS
Notary Public, State of New York
No. 03-0930903
Qualified in Queens County
Commission Expires March 30, 1979